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No. 82-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1982

BENJAMIN SIEGEL,

Petitioner,

v.

STATE OF NEW YORK and EDWARD J. KURIANSKY, Deputy New York Attorney General for Medicaid Fraud,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARTHUR G. WEINSTEIN
Attorney for Respondents
State of New York and
Edward J. Kuriansky
270 Broadway
New York, New York 10007
(212) 587-5282

QUESTIONS PRESENTED

1. Whether a State may constitutionally require plea bargains between defendants and prosecutors to be placed on the record where they can be subject to scrutiny by the trial judge.

2. Where such a record is made and where the defendant, with the advice of counsel who knew or should have known that State law barred enforcement of concealed off-the-record promises, tells the judge that he relies on the record, is the court constitutionally required to recognize a subsequent allegation of an additional, implicit understanding between defense counsel and prosecutor.

3. Whether, assuming that the defendant is constitutionally entitled to prove that his plea was entered as part of an off-the-record understanding which he concealed from the sentencing judge, a de novo credibility finding by a

State appellate court that such a constructive agreement did exist is binding for federal habeas corpus purposes after the decision of that court has been overturned by the State's highest court on the ground that no factual finding was appropriate.

4. Whether, assuming there was a legally cognizable off-the-record understanding that in return for his plea of guilty to perjury the defendant would be entitled to permanently withhold evidence from state and federal courts, grand juries and Congress, he should be granted "specific performance," as opposed to an opportunity to withdraw the plea.

5. Whether certiorari should be denied where the delay necessitated by the litigation may permit petitioner to withhold evidence from a grand jury long enough to render it worthless.

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For the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, State of New York and Edward J. Kuriansky, its Deputy Attorney General for Medicaid Fraud Control, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Second Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals, rendered October 22, 1982, is reported at 691 F.2d 620.

Prior court opinions, in chronological order, were:

-- an unreported decision of the New York State Supreme Court, Queens County, rendered December 17, 1980;

-- a decision of the Appellate Division of the Supreme Court, Second Department, rendered April 16, 1981, officially reported at 83 A.D.2d 630;

-- a decision of the New York State Court of Appeals, rendered February 18, 1982, officially reported at 55 N.Y.2d 116, rearg. denied, 56 N.Y.2d 570;

-- an unreported decision of a trial term of the State Supreme Court, New York County, rendered April 27, 1982; and

-- an unreported decision of the United States District Court for the Southern District of New York, rendered June 15, 1982.

COUNTER-STATEMENT OF THE CASE

The prolonged history of this case began in March of 1979, when petitioner Benjamin Siegel, a wholesale meat salesman, lied before a New York County grand jury investigating Medicaid fraud. He falsely swore, under immunity, that he had no knowledge of or involvement in the payment of kickbacks to nursing home operators and that he did not participate in any conversations about them.

Under indictment for three counts of perjury in the first degree, a Class D felony, Siegel offered, through his counsel, to plead guilty to a misdemeanor. The State prosecutor refused the plea unless Siegel would also agree to

cooperate with the grand jury's investigation. Siegel's counsel informed the prosecutor, in the judge's chambers, that their client was unwilling to do so because his commission sales would suffer if his cooperation ever became known to his customers. The prosecutor consequently insisted on a felony plea.

However, as one of his attorneys subsequently testified, Siegel's primary concern was not the level of the plea but rather avoiding a prison sentence. When the trial judge, on the basis of a preliminary probation report, promised not to impose a prison term, Siegel offered a plea of guilty to one count of perjury in the second degree, a Class E felony. Before accepting Siegel's plea, the judge questioned him in open court and Siegel confirmed that he was in fact guilty, that he understood the sentence promise, and that he was entering the

plea of his "own free will," fully aware of the rights that he was giving up. After Siegel's counsel assured the judge that "Your Honor fully understands the facts" and that "we rely on the record," a term of probation plus a $2,500 fine was imposed. No appeal was taken.*

About six months later, Siegel was subpoenaed by the same prosecutor's office to appear before a different grand jury, this one in Queens county, investigating kickbacks in the hospital industry. After Siegel's attorneys were unsuccessful in seeking to have the subpoena withdrawn on the ground of "double jeopardy," they "thought back over what

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* Contrary to the various intimations in the petition for certiorari, the judge never questioned the "validity" of the indictment. His earlier reference to a "gray area," cited at 4 and 11 of the petition, was made in rejecting a novel but highly technical attack on the draftsmanship. Petitioner's guilt of perjury was never seriously disputed.

had taken place" in New York County and moved to enforce an alleged plea bargain restricting the scope of Siegel's grand jury testimony to matters occurring in Queens after the date of his perjurious testimony in New York County. Testifying in support of that motion, both of Siegel's attorneys conceded that there had been "no discussion whatsoever" about his being absolved from further grand jury appearances. But they maintained when the prosecutor insisted that Siegel plead to a felony when he refused "to cooperate or to give any information to the Special Prosecutor's office in connection with -- as a condition of his plea," he was implicitly promising that Siegel would never again be compelled, before any state or federal grand jury, court, or even Congress, to give any information about "matters covered" in his original perjurious testimony. One

of Siegel's attorneys testified that the prosecutor said he "understood" the defense's concern "about this business of being required to give testimony and so on." From that, Siegel's attorney "gathered that he acquiesced." Siegel's other attorney agreed that the judge "was not part of our understanding."*

The prosecutor testified that while he had told Siegel's lawyers that he would not accede to a misdemeanor plea unless their client voluntarily agreed

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* This testimony by petitioner's own attorneys squarely refutes their current assertions, unsupported by any evidence or findings, that "the sentencing court was fully aware" of petitioner's "understanding" and that the judge "complied with the bargain." Petition at 5, 6, 10, 11. Similarly, the repeated intimation that this supposed understanding concerning future grand jury testimony was articulated during the unrecorded discussions "at the Bench" (id. at 4, 10) is inconsistent with the attorneys' testimony on this point as well as their testimony that that there had been "No discussion whatsoever" of it, even with the prosecutor alone.

to cooperate, he never made any promise to exempt Siegel from compulsory process if he pleaded guilty to a felony.

After hearing the testimony, the State court found, as fact, that the prosecutor had made "no promise * * * that petitioner would never have to testify before a Grand Jury" (emphasis in original). But it also found that he had given "equivocal answers" "when the possibility of future Grand Jury appearances was raised." Holding that the prosecutor was under "a duty to end that confusion," the court erected a promise by estoppel. It also held that Siegel was entitled to "specific performance."

On appeal, the Appellate Division of the State Supreme Court rejected the estoppel theory, noting, among other things, that Siegel's own attorneys each testified that the question to which the prosecutor supposedly gave equivocal

answers was never posed. But it reached the same result by making its own credibility finding that the prosecutor had knowingly assented to Siegel's desire to withhold evidence from future grand juries. It also agreed that specific performance of that constructive promise was the appropriate remedy.

The prosecutor appealed from both the factual and legal aspects of that decision to the State's highest court, the Court of Appeals. The Court of Appeals found no need to consider whether the evidence supported the Appellate Division's credibility finding, because the hearing should never have been held at all. It reversed under a settled principle of New York law that once the terms of a plea bargain are placed on the record, courts may not, except in the most unusual circumstances, recognize any other purported "promises, representations,

implications [or] the like." The only distinguishing factor in this case was the sentencing judge's failure to ask Siegel, in so many words, whether any off-the-record promises had been made; but the Court of Appeals held that while the judge should have made that inquiry, it was still the defendant's burden to place any promise upon which he seeks to rely on the record, at least where he is represented by experienced counsel. The court's refusal to recognize Siegel's belated claim also eliminated the need for it to decide whether a prosecutor's promise to permit evidence to be withheld from a grand jury could be specifically enforced.

Siegel then moved, before the trial term, to vacate his plea on the ground that it was induced by the same unkept "promise." Adhering to the Court of Appeals' decision that the alleged

promise could not be judicially recognized, trial term denied the motion.

After further State appeals were rejected, and stays denied by Associate Justice Marshall and by this Court en banc, Siegel filed a combination writ of habeas corpus and civil rights action in the Southern District of New York.

The District Court found, as a basis for the writ, that Siegel had a federal constitutional right to establish that his plea was the result of an off-the-record agreement. It held that although Siegel's failure to inform the sentencing judge of his understanding was a violation of New York law, it did not constitute a procedural default which would preclude federal consideration of it. As to whether such an understanding actually occurred, and what the appropriate remedy ought to be, the District Court concluded that it was

"bound by the findings" of the Appellate Division on those points even though the prosecutor's challenge to them had not been resolved by the State's highest court. The District Court therefore issued what it called a preliminary injunction "prohibiting the State Attorney General from questioning Siegel concerning matters discussed in the prior grand jury proceeding."

On appeal, the Court of Appeals for the Second Circuit reversed. It held that the State rule which barred recognition of off-the-record plea agreements -- in essence a statute of frauds -- was a constitutional method to attain "three important policy objectives." First, by making sure that the judge was aware of all inducements before he accepted the plea, the rule makes it more certain that the plea is a voluntary admission by a guilty person, and not the act of

an innocent person faced with an overly attractive inducement. Second, the rule eliminates the "clandestine atmosphere" in which secret deals between prosecutors and defendants can undermine the integrity, and the appearance of integrity, of the judicial system. Third, the rule helps assure the finality of judgments by preventing "indiscriminate post-conviction proceedings."

Turning to the facts of the case, the Circuit Court found that due process was satisfied when the State sentencing judge carefully interrogated Siegel, in the presence of his "two experienced attorneys," and had received emphatic assurances that he understood everything that was occurring and was pleading guilty of his "own free will." Because State cases dating back to 1974 had "made it clear that, to be enforceable, a plea bargain normally had to be on the

record," the Circuit Court recognized that "Siegel, through his counsel, knew or should have known, at the time of the plea, that off-the-record promises were unenforceable" and that application of the rule to him consequently did not violate federal due process. "Accordingly," it concluded, "Siegel is neither entitled to vacatur of his plea nor specific performance of the off-the-record constructive agreement found by the Appellate Division."

Because the District Court's preliminary injunction left no room for further legal or factual proceedings, the Circuit treated it as a final order and vacated the order with instructions to dismiss the case and enter final judgment for the defendants.

Siegel sought to delay the mandate by moving for reargument, which was denied, and for a stay pending this

application, which was granted on November 15, 1982. But the terms of the preliminary injunction did not bar the grand jury from questioning Siegel about matters which arose after his perjury, because he had "never claimed that the promise extends to events which occurred after March 1979 or to matters not otherwise covered by his previous testimony." Appellee's brief to the Second Circuit at 11, n. 6. Indeed, his counsel had explicitly assured that court, under oath, that:

> From the outset of the proceeding, plaintiff has been willing to be questioned * * * about any matter not covered by the plea bargain which concerned itself with plaintiff's prior testimony of March 13, 1979, before a New York County Grand Jury.

Affidavit of Eleanor Jackson Piel in opposition to a motion for an expedited appeal at 4. This was the same position that Siegel had taken in his original

motion attacking the scope of the Queens County subpoena: "[W]e concede that his testimony about such matters may be required." Affirmation of Eleanor Jackson Piel at 8.

Deciding to obtain at least that much evidence, the prosecutor directed Siegel to appear before the grand jury on December 1, 1982, stating in writing that he would be asked no questions that were barred by any injunction then in effect. But despite her prior concession that her client was required and willing to testify about matters beyond the "promise," Siegel's counsel declared that so long as the preliminary injunction concerning matters discussed in 1979 remained in effect, she would treat any demand that her client testify at all as "a nullity," and so advise him. Siegel consequently did not appear before the grand jury on December 1.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS SOUND AND IN CONFORMITY WITH THE LAW

The Court of Appeals for the Second Circuit was correct in holding that the New York Court of Appeals acted constitutionally in refusing to recognize petitioner's claim of a constructive plea bargain, concealed from the sentencing judge and never articulated to anyone until months afterwards, that he would be forever entitled to withhold evidence in consideration for his guilty plea to perjury.

The Circuit found that New York's insistence that plea bargains be placed, in their entirety, on the record, except in the most unusual circumstances [People v. Selikoff, 35 N.Y.2d 227, 244 (1974), cert. denied, 419 U.S. 1122 (1975)], and its corresponding refusal to recognize off-the-record "promises,

representations, implications, and the like" [People v. Frederick, 45 N.Y.2d 520, 576 (1978)], constitutes, in essence, a statute of frauds which serves three important policy objectives. One, it enhances the "certainty of guilt" by apprising judges of all inducements and thus enabling them to screen those so attractive as to be likely to override even an innocent person's desire to stand trial. Two, it protects the integrity of the judicial process, and the equally important perception of its integrity, by eliminating the "clandestine atmosphere" in which corrupt deals may flourish. Third, it assures finality by preventing "indiscriminate post-conviction proceedings" challenging the judgment. The Circuit therefore concluded that the holdings in Selikoff and Frederick do not violate federal due process:

> To the contrary, the rule promotes openness, certainty, and finality of plea proceedings. Furthermore, assuming the defendant is aware that off-the-record promises by the prosecutor are void * * * the memorialization in the record of all promises upon which he relies will best protect the defendant's post-conviction expectations.

691 F.2d at 624-25.

The Circuit recognized that petitioner's counsel, both with many years at the bar [83 A.D.2d at 632, n. 2], could not have been ignorant of the New York Court of Appeals' emphatic condemnation of off-the-record plea bargains in 1974 and again in 1978:

> In addition to their explicit holdings, both Selikoff and Frederick made it clear that "to be enforceable, a plea bargain had to be on the record. Indeed Frederick had expressly stated the defendant had the burden of placing on the record promises on which he relied and which he would seek to enforce in the future.

691 F.2d at 626-27, citing 45 N.Y.2d

at 526 (emphasis in original). "Thus," the Circuit concluded,

> Siegel, through his counsel, knew or should have known, at the time of the plea, that off-the-record promises were unenforceable, and therefore he should have undertaken to place his entire understanding of the plea bargain on the record for the trial judge's review -- as well as any possible appellate or collateral review."

Id. at 627.

The Circuit's thorough analysis of the law and the circumstances of this case answer most of the arguments made in the petition for certiorari.

The Circuit agreed with petitioner's initial premise (petition at 8) that Santobello v. New York, 404 U.S. 257 (1971), insures that if he had been the beneficiary of a promise that he could withhold evidence in return for entering a guilty plea, he would be entitled to "what is reasonably due in the circumstances." 691 F.2d at 623.

It differed as to what was reasonably due. Despite petitioner's superficial analysis of this case as "indistinguishable from Santobello (petition at 9), the prosecutor here did not admit making an explicit promise which a colleague failed to honor because he was unaware of it. It is undisputed that the prosecutor who accepted petitioner's plea was admittedly never told of his attorneys' off-the-record understanding that their client was seeking the right to withhold evidence forever. Even accepting the intermediate State court's finding that the prosecutor tacitly shared that understanding (see Point III), the Circuit recognized that because Siegel's counsel either knew or should have known that enforcement of it was clearly barred by State law, their reliance was "unreasonable" and hence not entitled to fulfillment under Santo-

bello. 691 F.2d at 627, n. 7.

Contrary to petitioner's argument, Blackledge v. Allison, 431 U.S. 63 (1977), does not "reject the very rule" at issue here (petition at 10) or in any way prohibit states from requiring that plea bargains be placed on the record. In that case the defendant had pleaded guilty under a de facto rule which was exactly the opposite. Under what was then North Carolina practice, defendants were required to fill out a routine form asking "yes" or "no" as to whether they had been influenced by any promises or threats. Allison swore that he had been promised a ten-year sentence, but was told by his counsel to answer negatively "so that the court would accept the plea." 431 U.S. at 69.

> The litany of form questions followed by the trial judge at arraignment nowhere indicated to Allison (or indeed to the lawyers involved) that plea bargaining was

> a legitimate practice that could be freely disclosed in open court. Neither lawyer was asked to disclose any agreement that had been reached, or sentencing recommendation that had been promised. The process thus did nothing to dispel a defendant's belief that any bargain struck must remain concealed -- a belief here allegedly reinforced by the admonition of Allison's lawyer himself that disclosure could jeopardize the agreement.

Id. at 77.

The distinction between Allison's plea under that clandestine and hypocritical system, and Siegel's under the New York rule, could hardly be more vivid. As the Circuit noted, New York unequivocally recognizes the legitimacy of the plea bargaining process and not only permits, but requires, that the results be fully and freely disclosed to the judge on the record. 691 F.2d at 620. In this case, that record in fact does show just such an agreement: the judge's openly made and openly performed

promise concerning sentence. In stark contrast to Blackledge, there was simply nothing here to encourage petitioner to believe "that any bargain struck must remain confidential." On the contrary, he had to know through his attorneys that he was obliged to speak fully then or forever hold his peace. The Circuit therefore concluded that rather than frustrate defendants' legitimate expectations, as the old North Carolina practice did, the New York rule was designed to "best protect them" and to insure what Blackledge cited as "the chief virtues of the plea bargaining system -- speed, economy, and finality." 691 F.2d at 625, citing 431 U.S. at 71.

The Circuit also explicitly rejected the argument that Boykin v. Alabama, 395 U.S. 238 (1969), required the State judge to ask petitioner, in so many words, if there was a concealed under-

standing (petition at 12). It held that neither Boykin nor any of its own opinions imposed a constitutional duty on State judges to recite any "specific catechism" in order to assure the voluntariness of a plea. 691 F.2d at 626.* The Circuit noted that petitioner had personally told the State judge that he was pleading guilty of his "own free will" and understood "everything that has happened here today." "Siegel and his two experienced attorneys made no mention on the record of the alleged agreement not to require testimony about the subject matter of his prior grand jury testimony * * * ." Without even mentioning the attorney's

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* Petitioner's assertion that the Circuit overlooked the "critical fact" that the judge neglected to ask this question (petition at 4, n.) is thus demonstrably incorrect. The Circuit simply did not find the omission to be constitutionally significant.

added assurance to the sentencing court that "Your Honor fully understands the facts" and that "we rely on the record" [minutes of sentencing at 7-8], the Circuit concluded that the judge's colloquy with petitioner was sufficient to assure the voluntariness of his plea under Boykin, and that "due process" did not entitle him to subsequently assert that a concealed understanding had been critical to his decision to plead guilty. 691 F.2d at 626. The Circuit's reading of Boykin was correct.

Moreover, this claim need not have been reached, and should not be considered by this Court, because it had not been fairly presented to the State courts. Picard v. Connor, 404 U.S. 270 (1971); Anderson v. Harless, ___ U.S. ___, 103 S.Ct. 276 (1982). Although petitioner had claimed that the Selikoff-Frederick rule should not be

applied unless the defendant explicitly denies that any off-the-record inducements exist [55 N.Y.2d at 120-21], it was not until petitioner's brief to the Circuit did he contend that Boykin imposed the burden of seeking an express disclaimer on the court.

The Circuit also rejected petitioner's contention that this application of the Selikoff-Frederick rule was unpredictable. Petitioner had argued there, as he does here (petition at 6, n.), that prior New York decisions, including Chaipis v. State Liquor Authority, 44 N.Y.2d 57 (1978), gave him the right to enforce off-the-record promises whose existence was not expressly refuted by the record. The Circuit correctly noted that Chaipis held no such thing. 691 F.2d at 627, n. 7. Nor do the other State cases cited by petitioner support any right to a hearing to establish the

existence of an agreement which, if it did exist, was entitled to no recognition as a matter of law. People v. Frederick holds precisely the contrary.

The Second Circuit did not address seriatim the various decisions by other circuits which petitioner now claims are in conflict with it (petition at 14). But, as it recognized, this is a "novel issue" because only New York, with its extraordinary volume of cases and consequent need for effective and final dispositions, has explicitly announced a "policy of enforcing only those portions of a plea agreement which are actually placed on the record at the plea proceeding." 691 F.2d at 621. Thus no other circuit has dealt with an off-the-record understanding which the defendant knew or should have known to be unenforceable. Indeed, the majority of cases cited involve off-the-record promises by

federal prosecutors, which, notwithstanding Rule 11 of Federal Rules of Criminal Procedure, can be judicially recognized in an appropriate case. Cf. Fontaine v. United States, 411 U.S. 213 (1973). As the Circuit noted, the sole issue here is whether the due process clause of the Constitution requires recognition of a constructive promise which petitioner knew or should have known to be unenforceable under State law. 691 F.2d at 621, 626, 627. No federal case so holds, and absent a rule like New York's in any other State, there is not even a possiblity of a conflict between circuits. There is simply a strong and consistent State rule which, even making the dubious assumption that Siegel's lawyers were ignorant of it in 1980, could surely escape no competent New York lawyer after its reaffirmation in this case.

II. PETITIONER HAS SHOWN NO CAUSE FOR VIOLATING THE STATE'S PROCEDURAL REQUIREMENTS

The Circuit Court's extensive review of the Selikoff-Frederick rule was more searching than was required. It was not necessary to agree with all the salutary policies behind the rule, as that court did, to sustain it. It is sufficient that New York, in the exercise of its "initial responsibility for vindicating constitutional rights," has adopted a rule legitimately designed to enable its judges to do so and which petitioner showed no cause to ignore. Engle v. Isaac, ___ U.S. ___, ___, 102 S.Ct. 1558, 1571-73 (1982); Wainright v. Sykes, 433 U.S 72 (1977).

As the Circuit recognized, the Selikoff-Frederick rule was intended to vindicate constitutional rights. Among other things, it assures, as Boykin v. Alabama requires, that judges are

apprised of the facts needed to decide whether a plea has been voluntarily entered. It assures, in fairness to both the defense and prosecution, that any inducements are promptly memorialized before that judge so that they can be neither fabricated nor denied nor distorted later on; in other words, to make sure that the defendant will get neither more nor less than what is "reasonably due." Santobello v. New York, 404 U.S. at 262.

Like the requirement of a contemporaneous objection to rulings at trial, the rule that plea bargains be made a matter of record is thus designed to insure that the State proceedings "be as free from error as possible." Wainright v. Sykes, 433 U.S. at 90. Pursuant to that rule of procedure, New York denies defendants the right to bring belated claims of off-the-record agreements or

understandings. 55 N.Y.2d at 121. The Circuit therefore could have decided the case solely on the principle that where "a procedural default bars state litigation of a constitutional right, a state prisoner may not obtain federal habeas corpus relief absent a showing of cause and actual prejudice." Engle v. Isaac, ___ U.S. at ___, 102 S.Ct. at 1572.

Petitioner demonstrated no cause for ignoring the well-established State rule, except for the discredited argument that his two highly experienced lawyers could not have anticipated its application. Of course, even a bona fide unawareness of the law does not automatically excuse every procedural default. Engle, 102 S.Ct. at 1574-75. Moreover, counsel did not merely neglect to alert the State judge to the alleged understanding. They affirmatively misled him by saying that they were sure

that he "fully understands the facts," and that they were content to "rely on the record." Ignorance of the law can neither excuse nor even explain that conduct. Nor should petitioner be heard to claim actual prejudice simply because the law did not allow him to eschew that reliance at his pleasure.

In short, the State exceeded its burden by convincing the Circuit that its procedural rule was one which will "best protect the defendant's post-conviction expectations." 691 F.2d at 625. It is enough for constitutional purposes that the rule was reasonably calculated to bring such claims to the attention of State judges in a contemporaneous, complete, and reliable way. Certiorari should not be granted where petitioner has not even come close to a presenting a valid excuse for having flagrantly violated that rule.

III. SUMNER v. META IS INAPPLICABLE

Petitioner's remaining contention is that the Circuit Court violated Sumner v. Meta, 449 U.S. 539 (1981), by "ignoring" the factual finding by the State Appellate Division that the prosecutor had shared defense counsel's belief that if their client pleaded guilty to committing perjury before the grand jury he would be entitled to withhold certain evidence in the future (petition at 16-18). He is wrong.

The Circuit did not ignore this finding. On the contrary, its decision was explicitly premised on "the off-the-record constructive bargain found by the Appellate Division." 691 F.2d at 625. But it held that petitioner's "purported reliance on the constructive promise found by the Appellate Division was unreasonable as a matter of law" because, as he knew or should have known,

it was "a nullity at the time the plea was accepted." 691 F.2d at 627, id. at n. 8. In essence, the Circuit assumed arguendo that there may have been a constructive off-the-record promise, but agreed with the State Court of Appeals that, "[w]hatever understanding may have been reached" was unenforceable as a matter of law, and thus the "scope and meaning of the statements made during the plea negotiations" were irrelevant. 55 N.Y.2d at 119-20.

The higher courts' assumption of such an agreement for purposes of their analyses of course does not mean that they were obligated to accept the Appellate Division's findings as true for all purposes. The actual existence of a tacit meeting of the minds between defense attorneys and the prosecutor has never been finally resolved so as to be binding as a matter of law.

As noted by the New York Court of Appeals, the two lower states courts had not agreed on this question. The hearing court believed that "no definite promise had been made regarding future grand jury testimony," but effectively created such a promise by estoppel. 55 N.Y.2d at 119. The basis of the estoppel was the prosecutor's failure to end the "confusion," which supposedly was generated when petitioner's counsel stated "on several occasions * * * that their client was deeply concerned about future New York Grand Jury appearances." Petitioner's appendix at 44a- 45a.

The Appellate Division recognized that that premise had "no support in the record and cannot be affirmed" because "petitioners' own counsel testified that there had been no specific discussion of further Grand Jury appearances." 83 A.D.2d at 633. The Appellate Division

also held that plea bargains could not be created by estoppel, only by knowing consent, and thus if, as the trial court found, confusion had separated the two sides, the defense's unilateral "impression" of an agreement could not be given effect. Id.

It then made its new findings of fact. At the hearing, the prosecutor testified that he recalled mentioning during plea negotiations that a future grand jury subpoena was possible, a statement which defense counsel stated she did not recall hearing. The Appellate Division reasoned that if the prosecutor's testimony were credited, it would have to reverse. It therefore inferred that the lower court -- although it had decided the case on an entirely different theory and never mentioned that testimony -- must have made an "implicit finding" that the prosecu-

tor was not credible on that point. The appellate court then extrapolated that into a finding that he was also lying about his state of mind. Id. at 634.

The court also cited testimony that the prosecutor had indicated his assent to defense counsel's proposal that their client not be required to "'give information,' 'talk about,' or 'be questioned about' the matters covered in his perjury indictment." Id. at 632. But those words were taken out of context: what petitioner's counsel testified that she proposed was merely that he "not be asked to cooperate or give any information to the Special Prosecutor's office in connection with -- as a condition of his plea." Minutes of hearing at 29. In other words, petitioner asked for no more than the right to enter a lesser plea with a guarantee of no prison sentence and without having

to make any affirmative commitment in return. That is what the record shows occurred. If the prosecutor had also consented to absolve petitioner from compulsory process forever, neither he nor petitioner's counsel ever said a word about it, on or off-the-record.

Petitioner insists that under the federal habeas corpus statute, the Appellate Division's finding of a constructive agreement must be presumed correct. 28 U.S.C. §2254(d). "That presumption, however, generally attached only to determinations of historical fact, 'made by the judge who heard the evidence, for only he is in a position to evaluate the credibility of the witnesses.'" White v. Finkbeiner, 570 F.2d 194, 201 (7th Cir. 1978); citing Hill v. Nelson, 466 F.2d 1346, 1348 (9th Cir. 1972). Under this general rule, deference is due only to the hearing

court's assessment that the negotiations ended in "confusion," not in agreement.

Petitioner cites Sumner v. Mata for the proposition that factual determinations by appellate courts are also presumed correct under §2254(d). But Sumner involved questions concerning the fairness of a pretrial identification procedure, raised for the first time on appeal and concededly capable of resolution solely upon the trial court record. 449 U.S. at 543, 546. This Court was not presented with a de novo credibility finding by an appellate court, and thus had no occasion to hold whether the "material fact" that a witness had not testified truthfully can be adequately "developed," within the meaning of §2254(d)(3), through an examination of a an appellate record or whether such a finding constitutes the kind of "full and fair" determination which 28 U.S.C.

§2254(d)(2) requires.

But even if such a finding could be deemed the equivalent of an assessment by the judge who actually heard the testimony, in this case the merits of the crucial factual dispute were never "resolved" by the State courts within the meaning of §2254(d)(a), and thus neither version can validly be "presumed to be correct." The New York Court of Appeals was asked to review the record to determine whether there was any evidence to support the Appellate Division's de novo finding as to what was in the prosecutor's mind. 55 N.Y.2d 117. Rather than leave that finding "undisturbed," as petitioner claims (petition at 17), the Court of Appeals effectively vacated it by holding that the hearing upon which it was based should not have been held in the first place. Id. at 121. Because it agreed with that

holding, the Circuit Court had no reason to decide which finding, confusion or agreement, or neither, should be treated as correct for purposes of federal habeas corpus proceedings.

Thus, if the New York Court of Appeals and the Circuit were found to be wrong in holding that petitioner's understanding was a nullity upon which he could not reasonably rely, further hearings, probably before the District Court, would be essential to determine whether, in fact, there had been a "promise" or its equivalent made somewhere in the inner recesses of the prosecutor's mind.*

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* Petitioner's assertion that his allegations are now established beyond question because they were not denied in respondents' answer in the District Court (petitioner at 3, n.) is disingenuous. There has been no answer filed yet simply because the appeal was taken from a preliminary injunction.

And if it were then found that the prosecutor did constructively promise petitioner that he could withhold evidence from federal and state grand juries, courts and even Congress, as his counsel maintained, the State Court of Appeals would have to resolve what this Court has held to be within the State courts' discretion, namely whether the "ultimate relief" to be accorded petitioner should be "specific performance" or the opportunity to withdraw his plea. Santobello v. New York, 404 U.S. at 262-63.

This question, too, had been presented to the State Court of Appeals but not reached. The prosecutor had argued that under State precedents and public policy he had no power to bargain away a grand jury's right to evidence, and that specific performance of such a bargain was anathema to the principle

that the law is entitled to every man's evidence. 55 N.Y.2d at 117. But again, the court's holding that the alleged off-the-record promise could not be recognized rendered resolution of this issue unnecessary. Id. at 121.

The mere existence of these open issues of fact and law does not, in and of itself, prevent the granting of a writ of certiorari. But it should be recognized that the record is far from being as "unclouded" by unresolved subsidiary issues as petitioner blithely claims (petition at 3, n.). More importantly, the virtual certainty that this Court would have to remand to either the State or federal courts, or both, if petitioner's threshold contention were accepted renders it likely that the time consumed would deprive the State of a meaningful opportunity to successfully litigate those points. See point IV.

IV. A FURTHER STAY WILL EITHER MOOT THE CASE OR OTHERWISE IRREPARABLY PREJUDICE THE STATE

Petitioner has avoided giving truthful testimony about his knowledge of kickbacks and other abuses of the Medicaid program since he was first subpoenaed by a New York County grand jury in March of 1979. Contending that he was "promised" that he would never have to testify about "matters" covered by that perjurious testimony, petitioner has strung together a series of stays and injunctions dating from the issuance of a second grand jury subpoena in July of 1980 and continuing to the present. Under Rule 41(b) of the Rules of Appellate Procedure, the current stay will continue until final disposition by this Court. If a writ of certiorari is granted, however, the State's need for the evidence is likely to be totally frustrated, and what is left of the case

and controversy rendered virtually moot.

Petitioner conceded to the Circuit Court that he has "never claimed that the promise extended to events which occurred after March 1979 or matters not otherwise covered by his previous testimony." Brief at 11, n. 6. But New York's Statute of Limitations requires that a prosecution be commenced within five years or less of any white-collar crime. N.Y.C.P.L. §30.10 (McKinney's). Thus, even if petitioner were to appear in the grand jury now, and at long last give the pre-March 1979 evidence he has been withholding, only felonies committed in whole or in part after early 1978 could still be prosecuted. If this Court were to grant certiorari, a final disposition could not be reasonably expected until the Spring of next year -- at which time any prosecution of any fraud occurring before March of 1979

would be time-barred. As a result, even if the State were to prevail as it has in the State and Circuit Courts of Appeal, its victory would be Phyrric because the evidence it fought so long to acquire by then might be all but worthless.

Assuming petitioner prevailed in the contention that an off-the-record constructive promise such as found by the State Appellate Division must be recognized, additional proceedings would be necessary to finally determine whether such a promise had in fact been made. See Point III at 36-40. If the State were ultimately to succeed in finally establishing that no constructive promise had been made, even more time will have been consumed and the evidence will have become even staler.

Even if petitioner were to succeed in establishing both the legal validity

and factual existence of the alleged promise, the State Court of Appeals would still have to determine the appropriate remedy. See Point III at 43-44. But the prosecution's position, which is that law and public policy preclude licensing anyone to withhold relevant evidence, will again be mooted by the passage of enough time to put petitioner in or close to the same position as "specific performance" of a promise not to compel his testimony.*

In sum, granting the application for a writ of certiorari would have virtually the same effect as a reversal on the merits because petitioner will have achieved the functional equivalent

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* Indeed, by that point, it would probably be to petitioner's advantage to agree that withdrawal of the plea was the proper legal remedy all along, allowing him to enjoy the benefits of both remedies.

of specific performance of an alleged off-the-record promise, in patent violation of State law, which the prosecutor contends was never made.

Moreover, to whatever extent petitioner's evidence might still be worth something at the conclusion of all this litigation, it is doubtful that he would even give it. Despite his counsel's sworn statement that petitioner had been willing "from the outset" to testify "about any matters not covered by the plea bargain which concerns itself with [his] prior testimony of March 1979," petitioner has recently refused to appear before the grand jury, even under a written assurance that his testimony would be so limited. See counter-statement of the case at 15-16. Given this unjustified and unjustifiable conduct, the most likely outcome of all this protracted litigation will be that

petitioner will be found in contempt for his categorical refusal to appear before the grand jury, irrespective of any limitation that the alleged promise might have placed on the questions that could have been propounded had he appeared. Having added contempt to his earlier perjury, petitioner comes before this Court without clean hands, candor, or any demonstrable stake in the outcome. Equitably and legally, he has surely forfeited any right to be heard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Arthur G. Weinstein
Attorney for Respondents
State of New York and
Edward J. Kuriansky
270 Broadway
New York, New York 10007
(212) 587-5282